

No. 85-1736 (2)

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

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JERSEY SHORE STATE BANK, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

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BRIEF FOR THE UNITED STATES

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8 pp

#### **QUESTION PRESENTED**

Section 3505 of the Internal Revenue Code provides that, where a lender furnishes funds directly or indirectly to an employer for the payment of wages, the lender in certain circumstances may be personally liable if the required employment taxes are not withheld from those wages and paid over to the IRS. The question presented is whether, as a prerequisite to the government's maintenance of a civil suit to collect the lender's personal liability in such circumstances, the IRS must have sent to the lender, within 60 days of making an assessment of the unpaid taxes against the employer, a copy of the tax bill that is required to be sent to the employer under Section 6303(a).

(I)

**TABLE OF CONTENTS**

	<b>Page</b>
Opinions below .....	1
Jurisdiction .....	1
Statement .....	1
Argument .....	3
Conclusion .....	5

**TABLE OF AUTHORITIES****Cases:**

<i>United States v. Associates Commercial Corp.</i> , 721 F.2d 1094 .....	2, 3, 4
<i>United States v. Merchants National Bank</i> , 772 F.2d 1522, petition for cert. pending, No. 85-1480 .....	3, 4

**Statute:****Internal Revenue Code of 1954 (26 U.S.C.):**

§ 3505 .....	2, 3
§ 6303(a) .....	2

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 781 F.2d 974. The opinion of the district court (Pet. App. 27a-37a) is reported at 628 F. Supp. 15.

**JURISDICTION**

The judgment of the court of appeals was entered on January 10, 1986. A timely petition for rehearing was denied on February 4, 1986 (Pet. App. 25a-26a). The petition for a writ of certiorari was filed on April 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

On December 30, 1983, the United States brought this action in the United States District Court for the Middle District of Pennsylvania against petitioner, a bank with its

(1)

principal place of business in Jersey Shore, Pennsylvania (Pet. App. 27a-28a). The government's complaint alleged that petitioner, beginning in October 1977, had lent funds to Pennmount Industries, Inc., under circumstances that rendered petitioner personally liable, pursuant to Section 3505 of the Internal Revenue Code,<sup>1</sup> for a portion of Pennmount's unpaid withholding taxes (Pet. App. 2a, 38a-41a). In its answer, petitioner admitted making commercial loans to Pennmount, but denied any liability under Section 3505 (Pet. App. 3a, 46a-49a).

Petitioner moved for summary judgment, contending that the government was precluded from suing it because the government had not provided it with notice of the tax assessments against Pennmount within the 60-day period specified in Section 6303(a) of the Code. That Section provides that the Commissioner, as soon as practicable after making a tax assessment, and in any event within 60 days after making an assessment, must "give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." Petitioner submitted that, if the instant suit were successful, it would be a "person liable for the unpaid tax" within the meaning of Section 6303(a). The bank accordingly argued that the Commissioner was required, within 60 days of making the assessments against Pennmount, to send the bank as well as Pennmount a copy of the tax bill described in Section 6303(a).

The district court granted petitioner's motion for summary judgment (Pet. App. 27a-36a). Relying on *United States v. Associates Commercial Corp.*, 721 F.2d 1094 (7th Cir. 1983), the district court held that the notice and demand for payment specified in Section 6303(a) must timely be sent, not only to the taxpayer against whom the

<sup>1</sup>Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

taxes in question have been assessed, but also to third parties against whom the government might seek to establish a future liability in a civil suit under Section 3505 (Pet. App. 33a-35a). Since the government conceded that it had not notified petitioner of the assessments against Pennmount prior to the commencement of the instant suit on December 30, 1983 (*id.* at 32a), the district court held that the government's suit was barred (*id.* at 35a-36a).

The court of appeals reversed, one judge dissenting (Pet. App. 1a-24a). The court expressly declined to follow (*id.* at 7a-8a) the Seventh Circuit's decision in *Associates Commercial* and the Eleventh Circuit's subsequent decision in *United States v. Merchants National Bank*, 772 F.2d 1522 (11th Cir. 1985), petition for cert. pending, No. 85-1480. Rather, the court of appeals held that Section 6303(a) requires notice only to those persons against whom the taxes in question have been assessed, and that "the government's failure to provide [a lender] with a copy of the notice of assessment and demand for payment sent to [the employer] does not bar its suit to collect [the lender's] liability under section 3505" (Pet. App. 17a). The bank's petition for rehearing was denied (*id.* at 25a-26a).

#### ARGUMENT

As the court of appeals observed, this case presents the same question as that presented in *United States v. Merchants National Bank*, petition for cert. pending, No. 85-1480. That question is whether, as a prerequisite to the government's maintenance of a civil suit to collect a lender's personal liability under Section 3505 for unpaid withholding taxes, the government must have sent to the lender, within 60 days of making an assessment of such taxes against the employer, a copy of the tax bill that is required to be sent to the employer under Section 6303(a). The Third Circuit below decided this question in a way that conflicts

with the decisions of the Seventh Circuit in *Associates Commercial* and of the Eleventh Circuit in *Merchants National Bank*. In our petition for a writ of certiorari in the latter case, we showed that this conflict in the circuits involves an important question of federal tax law warranting this Court's review, and we explained why we believe that the Third Circuit in the instant case answered that question correctly.<sup>2</sup>

Since the question presented here and in *Merchants National Bank* is a pure question of statutory construction unaffected by the facts of the two cases, we see little merit in petitioner's suggestion (Pet. 12) that the Court should grant both petitions and direct that the cases be "joined for argument." We think that the instant case in fact presents a slightly better vehicle for resolving the question. The respondent in *Merchants National Bank* has filed a cross-petition for a writ of certiorari (No. 85-1633) that in essence urges a variety of alternative grounds for affirmance. Although we have demonstrated the insubstantiality of those arguments in our brief opposing the cross-petition (85-1633 Br. in Opp. at 4-9), the instant case, because it is unencumbered by such baggage, presents the Section 3505 question more cleanly. The Court may thus find it appropriate to grant certiorari in the instant case and hold our petition in *Merchants National Bank* pending disposition of this case. Alternatively, it would be appropriate to grant certiorari in *Merchants National Bank* and hold this case pending the outcome there.

#### CONCLUSION

The petition for a writ of certiorari should be granted or, alternatively, should be held pending disposition in No. 85-1480.

Respectfully submitted.

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MAY 1986

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<sup>2</sup>We are supplying petitioner's counsel with a copy of our petition in *Merchants National Bank*.